Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ANTONIO HERNANDEZ-LOPEZ,
JOE EDWARD RAMIREZ, AND ALBERTO RUIZ,

Petitioners,

v.

STATE OF IOWA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Iowa

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause of the Fourteenth Amendment preclude the warrantless arrest and incarceration of a person the police believe to be a material witness to a crime?

2. Does the Due Process Clause of the Fourteenth Amendment preclude the government from incarcerating a mere witness for over five months when the witness has testified at a deposition at which all interested parties participated?

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PETITION FOR A WRIT OF CERTIORARI

Antonio Hernandez-Lopez, Joe Edward Ramirez, and Alberto Ruiz respectfully petition this Court for a Writ of Certiorari to review the decision of the Supreme Court of Iowa in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Iowa, App. 1-26, is reported at 639 N.W.2d 226. The opinion of the Iowa District Court for Sioux County, App. 27-28, is unreported.

JURISDICTION

The Judgment of the Supreme Court of Iowa was entered on January 24, 2002. The jurisdiction of this court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

Iowa Code §804.11 provides:

> When a law enforcement officer has probable cause to believe that a person is a necessary and material witness to a felony and that such person might be unavailable for service of a subpoena, the officer may arrest such a person as a material witness with or without an arrest warrant.

At the time of the arrest, a law enforcement officer shall inform the person of:

1. The officer's identity as a law enforcement officer; and

2. The reason for the arrest which is that the person is believed to be a material witness to an identified felony and that the person might be unavailable for service of a subpoena.

STATEMENT OF THE CASE

Though never charged with any crime, Petitioners were arrested without a warrant and incarcerated for over five months in the Sioux County Jail as material witnesses.

On August 5, 2000, Antonio Hernandez-Lopez, Joe Edward Ramirez, Alberto Ruiz, the petitioners herein, and Angel Alvarado Esquivel were occupants in an automobile involved in a fatal accident with a motorcycle. Esquivel was driving the automobile, while the other three occupants were passengers. All four occupants fled the scene of the accident. They were apprehended by

members of the Sioux County Sheriff's Office the following day. App. 1-2.

The initial investigation of the accident revealed the automobile had caused the accident by crossing the highway centerline and striking the motorcycle head-on. However, the investigating officers were unable to discern who was driving the automobile at the time of the accident. None of the vehicle's occupants would acknowledge the identity of the driver. Consequently, all four individuals were arrested as material witnesses pursuant to Iowa Code §804.11. App. 2.

On August 7, Esquivel and the petitioners were brought before a magistrate for an initial appearance. See Iowa Code §804.23 (individual arrested as material witness pursuant to §804.11 must be brought before nearest magistrate without unnecessary delay). The magistrate found probable cause to believe they were material witnesses. An appearance bond of $32,500 was set for each witness. App. 2.

The deputy sheriff who was in charge of investigating the accident, and who arrested the petitioners, filed a complaint and affidavit on August 8. The deputy claimed in the complaint that he had reason to believe the petitioners were necessary and material witnesses to a felony and that they might be unavailable for service of a subpoena. He further stated in the affidavit that the petitioners were occupants of a motor vehicle involved in the fatal collision. Additionally, the affidavit indicated the petitioners fled the accident scene and were later apprehended by law enforcement personnel. App. 2-3.

The county attorney subsequently filed trial informations against the petitioners claiming they were material witnesses under §804.11. Each information contained the proposed witness testimony of the deputy who filed the complaint and affidavit. The minutes of testimony further explained the petitioners were Mexican nationals believed to have entered this country illegally. The Immigration and Naturalization Service (INS) had placed detainers on the petitioners. The detainers required the State to immediately transfer the petitioners to INS custody upon release from state custody. App. 3.

A bond review hearing was held on September 5. The State resisted the petitioners' request to reduce the $32,500 bond to an unsecured appearance bond. The State cited the petitioners' critical role in the ongoing investigation of the accident and the likelihood they would be unavailable for trial if released. The district court denied the petitioners' application. App. 3.

Laboratory reports completed by the Department of Criminal Investigation on September 11 revealed Esquivel was the driver of the automobile on August 5. On October 17, Esquivel was formally charged by trial information with committing the crimes of vehicular homicide and leaving the scene of an accident. The petitioners gave depositions in the underlying matter on October 24. Esquivel and his counsel were permitted to conduct their own examination of the petitioners during the depositions. App. 3-4.

A second bond review hearing was held on October 30. The petitioners advanced both facial and as-applied

constitutional challenges to §804.11. Specifically, the petitioners contended §804.11 violated their rights to due process under the state and federal constitutions. Additionally, the petitioners alleged the statute violated the Eighth Amendment to the United States Constitution by infringing upon their right to be free from excessive bail. Both the State and Esquivel resisted the application. The district court denied the request. App. 4.

The petitioners then applied for discretionary review with the Supreme Court of Iowa. The application was granted on January 3, 2001. The Iowa Supreme Court reduced the appearance bond to $1,000 for each witness. Esquivel subsequently pled guilty to vehicular homicide in violation of Iowa Code §707.6A(2) and leaving the scene of an accident in violation of Iowa Code §321.261(3). Following the rendering of the guilty plea, the material witness charges were dismissed. The district court released the petitioners on January 8, 2001. App. 5.

REASONS FOR GRANTING THE PETITION

A. The Question of What Process is Due to Material Witnesses who are Detained is an Important Question of Federal Law That Has not Been Addressed by This Court.

This case raises two critical components of the Fourteenth Amendment's guarantee of liberty. The first issue is whether due process requires a warrant before a material witness can be arrested. The second is whether the government can detain a material witness indefinitely

pending trial when the witness has been deposed by all parties. This Court has not addressed either issue.

Addressing a constitutional challenge to Nebraska's material witness statute, the United States District Court for the District of Nebraska observed "whether and to what extent the due process clause of the Fourteenth Amendment applies to the detention of material witnesses has not been considered by the Supreme Court of the United States." *Application of Cochran*, 434 F.Supp. 1207, 1212 (D. Neb. 1977). This statement remains true today. A few United States Supreme Court cases have alluded to the issue by way of dicta which has been relied upon by lower courts to uphold the general validity of material witness statutes.

In *Stein v. New York*, 346 U.S. 156 (1953), the court stated that "the duty to disclose knowledge of a crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Id.* at 184. However, *Stein* primarily dealt with issues regarding whether confessions were coerced and the fairness of the trial process as it related to those confessions.

In *Hurdato v. United States*, 410 U.S. 578 (1973), the court addressed a Petition made by persons being held in federal custody as material witnesses; however, the issue before the court was not the validity of the witnesses' detention, but rather, whether the witnesses were entitled to compensation because of their incarceration. In fact, the court specifically noted that "they did not attack the validity or length of their incarceration as such, but sought monetary damages. . . . " *Id.* at 579.

The closest this court has ever come to squarely addressing the constitutionality of arresting and detaining material witnesses was in *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929). In that case, Cunningham was subpoenaed and appeared before a U.S. Senate committee. Cunningham refused to give information in response to questions asked by committee members, and the committee recommended that Cunningham be adjudged in contempt of the committee and of the Senate. *Id.* at 610. The Senate did not adopt the recommendation of the committee, but instead, passed a resolution reciting Cunningham's contumacy and instructing the President to issue his warrant commanding the Sergeant at Arms or his deputy to take Cunningham into custody and to bring him before the Senate to answer questions. *Id.* at 611. Cunningham filed a Writ of Habeas Corpus claiming that he was being held illegally under the warrant. *Id.* The court held that the capacity in which the Senate was acting was judicial in character. *Id.* at 613. In concluding that the Senate had the power to issue the warrant of arrest under the circumstances, the court found support for its conclusion by reasoning that:

> But undoubtedly, also, a court has power in the exercise of a sound discretion to issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise a witness will not be forthcoming. The statute of the United States (citation omitted) provides that any federal judge, on application of the District Attorney, and being satisfied by proof that any person is a competent and necessary witness in a criminal proceeding in which the United States is a party or interested, may have such person brought before him by warrant of

> arrest. . . . The constitutionality of this statute apparently has never been doubted. Similar statutes exist in many of the states and have been enforced without question. *Id.* at 616-617.

Certainly, this Court has never decided the question of whether a warrant must first be obtained before an arrest of a material witness can take place. The Court's decision in *Barry* which cites the then federal statute and discusses the Senate's power to issue a warrant for Cunningham's arrest, suggests that law enforcement, as a precondition to arresting a material witness, must obtain a warrant issued by a judicial officer.

Furthermore, this Court has never decided under what circumstances law enforcement authorities can continue to detain a material witness. Once the witness has offered his testimony under oath by way of a videotaped deposition with the prosecutor, defendant, and defense counsel present and allowed to participate, the witness's liberty interest would weigh heavily against continued incarceration.

The questions presented in this case involve a person's fundamental right to be free from physical restraint which is at the core of the Fourteenth Amendment due process clause. See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). This Court has long recognized that freedom from physical restraint and confinement is a fundamental liberty interest.[1] Iowa's material witness statute expressly

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[1] See *In Re: Gault*, 387 U.S. 1 (1967); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Vitek v. Jones*, 445 U.S. 480 (1980); *Schall v. Martin*, 467 U.S. 253 (1984); *United States v. Salerno*, 481 U.S. 739 (1987); *Kansas v. Hendricks*, 521 U.S. 346 (1997).

authorizes a law enforcement officer to arrest an individual, whom only the law enforcement officer believes to be a material witness, "with or without an arrest warrant" and further allows the law enforcement officer to make such arrest when the officer believes that such individual *might* be unavailable for service of a subpoena. See Iowa Code §804.11. There can be little doubt that the broad language of this statute which has been upheld by the Supreme Court of Iowa has a far reaching effect upon an individual's personal liberty.

Even though the governmental purpose is legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Schelton v. Tucker*, 364 U.S. 479, 488 (1960).

A decision by this Court on the questions presented is of great public importance, in particular, to guide law enforcement officials. Every state of this nation, including the federal government and the District of Columbia have some type of material witness statute.[2] However, the

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[2] Ala. Stat. 12-50.090-.100; Ariz. Rev. Stat. Ann. 13-4081-4084; Ark. Stat. Ann. 16-85-509; Cal. Code Ann. Pen. 878-882, 1332; Col. Rev. Stat. Ann. 16-9-302; Conn. Gen. Stat. Ann. 54-82j-54-82k; Del. Code Ann. Title II, §3523; DC Code §23-1326; Fla. Stat. Ann. 902.15-17; Code of Ga. Ann. 24-10-94; Haw. Rev. Stat. Ann. 835.1-8; Ida. Code 19-820-825; Ill. Comp. Stat. Ann. 725 ILCS 220/1-6; Ind. Stat. Ann. 35-37-5-1; Kan. Stat. Ann. 22-2805; Ky. Rev. Stat. 421.80; La. Rev. Stat. 15:257-259; Me. Rev. Stat. Ann. 15 §§1411-1414; Md. Code Ann. CJ §9-203; Mass. Laws Ann. Ch. 277 §70; Mich. Comp. Laws §767.35; Minn. Stat.

United States Supreme Court has never decided what is constitutionally permissible when law enforcement seeks to arrest and detain a person who is not even suspected of committing a crime, but is merely a witness to a possible crime. This nation is in need of the Court's guidance on these questions as law enforcement officers seek to protect the public through investigating and prosecuting crime while also attempting to protect the fundamental liberty rights of individuals.

The Supreme Court of Iowa chose to address the constitutional validity of Iowa's material witness statute despite its conclusion that the issues raised were technically moot. App. 9-10. In making this determination, the Supreme Court of Iowa stated:

> It is a virtual certainty that another individual will be arrested under this statute. Most importantly, we believe this is a case capable of repetition, yet evading appellate review.[3] App. 9.

Ann. §629.54-55; Miss. Code Ann. 13-1-19; Mo. Stat. Ann. §544.420, 440; Mont. Code Ann. 46-11-60; Neb. Rev. Stat. 29-507-509; Nev. Rev. Stat. Ann. 178.494; NH Rev. Stat. Ann. 597:22-23; NJ Stat. Ann. 2C:104-1-9; NM Stat. Ann. 31-3-7; NY Cpl. §620.10-80; NC Gen. Stat. 15A-803; ND Cent. Code 31-03-19; Ohio Rev. Code Ann 2937.16-18; Okl. Stat. Ann. 22 §270-275; Or. Rev. Stat. 136.608-614; Penn. Stat. Ann. 42 Rule 522; RI Sup. Ct. Rule of Cr. Proc. 46; SC Code Ann. 17-15-70; SD Cod. Laws 23A-43-18; Tenn. Code Ann. 40-11-110; Tex. CCP Art. 17.33-37; Utah Rule of Cr. Proc. 7(k); Vt. Stat. Ann. 13 §7551; Va. Code Ann. 19.2-127; Wash. Rev. Code Ann. 10.16.145, 160; W. Va. Code Ann. 62-1C-15; Wisc. Stat. Ann. 969.01(3); Wy. Rule of Cr. Proc. 46.3; 18 U.S.C. §3144.

[3] However, the Iowa Supreme Court only chose to address the facial due process challenges to Iowa's material witness

The United States Court of Appeals for the Ninth Circuit chose not to dismiss a material witness's habeas corpus petition on mootness grounds even though the material witness had been released from custody. In *Matter of Bacon*, 449 F.2d 933 (9th Cir. 1971), the Court of Appeals reasoned that decisions of the United States Supreme Court emphasized that the mootness doctrine should no longer be mechanically applied in habeas corpus cases. *Id.* at 936, citing *Carafas v. LaVallee*, 391 U.S. 234 (1968). The court noted that *Carafas* was a situation where the United States Supreme Court rejected the contention that the petitioner's claim was mooted by his unconditional release from custody after he had filed his Petition in the district court. *Bacon* at 936. The Court of Appeals also relied upon *Sibron v. New York*, 392 U.S. 40 (1968) which was a case where the appellant had served his six month sentence and was released before he was able to present his case on appeal. The Court of Appeals

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statute. The court did not address the as-applied challenges made and the court dismissed the appeal of those issues on mootness grounds. App. 9. The court reasoned that "a decision on their as-applied constitutional challenges would have no practical legal effect in the underlying controversy." App. 9.

The Supreme Court of Iowa was wrong to refuse to address the petitioners' as-applied challenge regarding their continued incarceration even after their depositions were given. Like the reasons given by the court for addressing the facial challenge, it is also a virtual certainty that another individual arrested under that statute will be detained, give a deposition, and ask to be released from custody. Furthermore, the cases discussed in Section B, *infra*, of this Petition show that the issue is one that is capable of repetition, yet evading appellate review.

quoted from the United States Supreme Court in *Sibron* and stated the following:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process – in the context of prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. *Bacon* at 936, citing *Sibron* at 392 U.S. 52-53.

Regarding this issue, one author has suggested that "perhaps the most egregious denial of fundamental liberties exists in the absence of provisions for prompt appellate review of a witness's detention." See Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 Iowa L.Rev. 1, 3 (1969).

This Court has, on many occasions, accepted review of a case if it is capable of repetition, yet evading review.[4] Just as pregnancy provides a classic justification for a conclusion of non-mootness, *Roe v. Wade*, 410 U.S. 113, 125 (1973), so too does detention of a witness during the trial phase of a criminal action provide a classic justification for a conclusion of non-mootness. As the Supreme Court of Iowa reasoned:

> Considering the time for processing an appeal, in addition to the relatively short duration of

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[4] *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911); *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *United States v. Phosphate Export Corp.*, 393 U.S. 199 (1968); *Roe v. Wade*, 410 U.S. 113 (1973); *Washington v. Harper*, 494 U.S. 210 (1990).

detentions under §804.11, a detainee will often be released from custody before an appellate court can reach the issue. App. 9-10.

B. State and Federal Court Decisions Regarding the Constitutionality of Warrantless Arrests of Material Witnesses and Indefinite Detentions Pending Trial Are in Conflict.

The Supreme Court of Iowa has upheld Iowa's material witness statute which authorizes the arrest of a person by a law enforcement officer "with or without an arrest warrant." App. 1. This holding is in conflict with the principles of due process and is also in conflict with cases decided in other jurisdictions. The Supreme Court of Iowa also refused to address the petitioners' claim in the lower court that their continued detention after they had given their videotaped depositions was a violation of their rights under due process. App. 9. By refusing to address this issue, the Supreme Court of Iowa essentially upheld the ruling of the trial court which ordered their continued incarceration after the petitioners' depositions were taken. App. 28. This decision, too, is in conflict with several other courts in other jurisdictions.

1. Warrant Requirement

The Iowa Supreme Court held in this case that the warrantless arrest of Petitioners satisfied due process. This holding is directly contrary to decisions from Nebraska, New Jersey, and Ohio.

In *Application of Cochran, supra,* the United States District Court for Nebraska stated the following:

> The material witness, . . . is unconditionally entitled to retain his liberty until the State establishes some sufficient basis for depriving him of it. *Id.* at 1214.

The court declared that the witnesses who were being held in that case were being detained in violation of their rights under due process. *Id.* at 1216. One of the reasons why those witnesses were not afforded due process was that the witnesses were arrested and taken into custody without any advance written notice of the allegations the State made against them which were used to deprive them of their liberty. The court specifically stated that "these cases illustrate the basic unfairness which can result where liberty is taken without adequate advance notice and without a written statement of reasons in support of the result." *Id.* The court's reasoning in *Cochran* suggests that a material witness should be allowed to answer to the allegations made against him at a hearing prior to his liberty being deprived. The court also noted that "there can be little difference between the question of whether the arrest and the detention are reasonable under the Fourth Amendment and whether they comport with the due process clause of the Fourteenth Amendment." *Id.* at 1216, n. 12.

That same reasoning was applied in *State v. Misik,* 238 N.J. Super. 367, 569 A.2d 894 (1989). In *Misik,* the witness was arrested without prior notice and a meaningful opportunity to be heard before he was committed to jail, and the due process issue presented was whether Misik was entitled to a pre-deprivation hearing as to his

status as a "material witness." *Id.* at 569 A.2d 899. *Misik* concluded that due process requires that before a person may be apprehended or detained as an alleged material witness, there must be a pending criminal action against an accused. *Id.* at 569 A.2d 903.

Also, the court held that a person believed to be a material witness may not be apprehended or detained without first having been served with an order directing the person to appear in court at a future date for the purpose of having the court determine whether the person should be adjudged a material witness and without first giving such person an opportunity to be heard in opposition thereto. *Id.* The court further held that only under exigent circumstances, where the requirements of effective law enforcement would be thwarted by requiring prior notice to be given to the person, the State may make an application to the court ex parte for the entry of an order directing the issuance of a warrant authorizing the police to take the person into custody and directing that the person be brought forthwith before the court. In support of that application, the State must furnish the court with a sworn affidavit containing clear and convincing proof to support the claim of exigency. *Id.* at 569 A.2d 904.

The court's holding in *Misik* is in direct contrast to a prior holding in New Jersey which allowed for the warrantless arrest and detention of a person believed to be a material witness. See *State v. Hand*, 101 N.J. Super. 43, 242 A.2d 888 (1968). In fact, the court in *Misik* acknowledged the holding in *Hand*, rejected its reasoning, and chose not to follow that court's holding. *Misik* at 569 A.2d 898 n. 4.

Therefore, *Application of Cochran, supra,* and *State v. Misik, supra,* which have addressed the same due process claims that the Iowa Supreme Court has decided are in stark contrast to the Supreme Court of Iowa's holding which does not even require so much as an ex parte warrant before arresting and detaining a person who is not even suspected of committing a crime, but is only suspected of being a mere witness. The state of New Jersey has conflicting decisions within its own borders regarding the ability of law enforcement to arrest a material witness without a warrant as shown by the court's decisions in *Misik* and *Hand.*

In *State ex rel. Dorsey v. Haines,* 63 Ohio App.3d 580, 579 N.E.2d 541 (1991), the Court of Appeals of Ohio addressed a material witness's challenge of her detention. In that case, the Ohio Court of Appeals held the following:

> We find that the method by which the warrant was issued does not satisfy the requirements of constitutional due process pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States.
>
> . . .
>
> We conclude that, at a minimum, a warrant to detain a material witness must be supported by probable cause, supported by oath or affirmation, to believe that the witness is material and that the detention of the witness is necessary to procure her attendance at trial. *Id.* at 579 N.E.2d 542.

Therefore, the Ohio Court of Appeals held that the material witness was being illegally detained and ordered her release.[5] *Id.*

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[5] One year later, the United States District Court for the Southern District of Ohio issued a contrary opinion in *Stone v. Holzberger*, 807 F.Supp. 1325 (S.D. Ohio 1992). The court relied upon an opinion enunciated by the United States Court of Appeals for the Sixth Circuit in *White by Swafford v. Gerbitz*, 892 F.2d 457 (6th Cir. 1989), which set forth a probable cause standard for the arrest without a warrant of persons who were suspected of violating the law. The district court then applied that same reasoning to the issue of arresting a material witness. The court concluded that:

> To have probable cause to arrest a material witness, the arresting officers must possess knowledge of facts or circumstances sufficient to warrant a reasonably cautious officer to believe that the witness possesses information material to the criminal investigation and is reasonably unlikely to appear to testify. *Stone* at 1337.

The Sixth Circuit Court of Appeals' decision in *White* addressed a Tennessee law and whether it would allow a police officer to arrest and detain a material witness to a crime without first obtaining a warrant. *Id.* at 460. The court also approved of law enforcement's action of arresting the plaintiff, White, without a warrant because they reasoned it was supported by probable cause. *Id.* at 461. Interestingly, Justice Jones of the Sixth Circuit issued a partial dissenting opinion claiming that a greater showing was needed to arrest and detain White as a material witness. Justice Jones reasoned that mere reticence to testify was not enough to warrant the arrest and detention of White. Justice Jones believed that, at a minimum, there should have been a stronger showing of White's "unwillingness" to testify. *Id.* at 465.

2. Continued Incarceration After Deposition and Pending Trial.

The petitioners gave their testimony by way of a videotaped deposition where the prosecutor, defendant, and defense counsel were allowed to participate. App. 4. Petitioners made an application to the trial court to be released on terms of an unsecured bond and claimed that their continued incarceration, after their depositions were given, was in violation of their due process rights because the petitioners claimed their continued incarceration constituted an impermissible punishment without a trial. App. 30. The trial court denied the petitioners' request and the petitioners were incarcerated until their release after the defendant in the underlying criminal action pled guilty. App. 5.

Most of the cases addressing the validity of continued incarceration of a material witness after the witness has given his deposition testimony have been found in decisions by the lower federal courts due to the fact that the federal material witness statute specifically allows for a material witness to secure his own release through the giving of a deposition if he cannot comply with the conditions of release. 18 U.S.C. §3144. The various cases addressing this issue show that a conflict exists among the federal courts as to when and under what circumstances it is permissible for the government to continue to incarcerate a material witness.

When the petitioners made their request for release after giving their depositions, it was met with resistance by not only the prosecutor but also the criminal defendant. App. 4. The trial court relied upon the criminal

defendant's right to confrontation as a basis to continue detention of the petitioners. App. 28.

The Iowa Supreme Court refused to address petitioners' claim that the continued incarceration after deposition violated their due process rights. Essentially, therefore, they let stand the lower court's ruling that a five month incarceration was not unconstitutional because release would have violated the criminal defendant's confrontation clause rights. Two federal appellate court decisions are squarely in conflict on this point, as well as federal district court cases and state cases.

The Tenth Circuit Court of Appeals squarely addressed this issue in *United States v. Eufracio-Torres*, 890 F.2d 266 (10th Cir. 1989). In that case, the criminal defendant was charged with illegal transportation of aliens and the government filed a motion requesting that seven passengers be declared material witnesses. *Id.* at 267. The government also filed a motion for detention of the material witnesses on which a hearing was held and the magistrate ordered such detention. *Id.* at 268. The government then moved to depose the material witnesses which was granted by the court and the material witnesses gave their depositions. After the depositions were given by the material witnesses, the magistrate ordered the release of the material witnesses to the INS under administrative detainers. *Id.* Before the witnesses were delivered to the custody of the INS, they were served with subpoenas to appear for trial and given instructions regarding reentry into the United States, travel reimbursement, and appearance fees in connection with the trial. *Id.* The government sought to use the deposition testimony of the witnesses based upon the unavailability of the material witnesses.

The criminal defendant, Torres, resisted the use of the deposition testimony claiming that the use of said testimony violated his constitutional right to confront his accusers at trial. *Id.* The trial court allowed the admission of the deposition testimony, Torres was convicted, and he appealed his conviction. *Id.*

The Court of Appeals held that the district court correctly weighed the competing interests involved in the case and made the correct decision to release the material witnesses and admit the deposition testimony of the witnesses at trial. *Id.* at 270. The court recited the district court's reasoning to arrive at its conclusion:

> The government need not ride roughshod over the constitutional rights of seven persons in order to ensure that the defendant's confrontation rights are not infringed upon under the circumstances present. Rather, the interests of the defendant must be balanced against those of the witnesses. On the one hand, the witnesses have a strong constitutional interest in not being detained when charged with no crimes. Significantly, the defendant, who was charged with a crime, was released on bond, whereas the witnesses, who were not charged – a circumstance not atypical of illegal transportation of aliens cases – were detained for more than six weeks. On the other hand, the defendant has an interest in confrontation at trial. Although the testimony did infringe on this interest, the depositions were trustworthy and allowed the defendant to challenge the witnesses' statements. The witnesses were told that they could be criminally charged if they lied. The defendant, through counsel, was afforded the opportunity to cross-examine the witnesses during the depositions.

> Further, the depositions were postponed until the defendant could travel to Kansas City to be present. In short, the balance tips toward the Fifth Amendment interests of the witnesses, and the government was reasonable in moving to depose and release the witnesses. *Id.* at 270.

The Court of Appeals for the Fifth Circuit issued a contrary opinion in *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987). In that case, the criminal defendant was charged with three counts of illegal transportation of aliens and various aliens were held in custody as material witnesses. *Id.* at 345. The district court ordered that the material witnesses be deposed pursuant to a standing order issued by the United States District Court for the Western District of Texas, that, in general, required alien material witnesses to be deposed and released within 60 days of the date of their detention. The standing order further provided that no objection to the use of the deposition procedure in lieu of retention in custody of material witnesses for trial shall be entertained absent proof that the release of the witness, in a particular case, would result in a failure of justice. *Id.* The defendant and the government objected to the deposing of the material witnesses; however, the magistrate ordered that the depositions take place. The depositions were videotaped and later tendered for presentation at trial.

The defense objected on constitutional, statutory, and procedural grounds. The court overruled the objections. *Id.* at 346. The witnesses were taken to the Mexican border, served with subpoenas, and instructed to come to the port of entry on a particular date and to contact the

agent releasing them in order that they could testify at trial; however, no such contact was made and the witnesses were unavailable. *Id.* The criminal defendant was convicted, and on his appeal, he argued that the government's presentation of the videotaped deposition testimony violated his constitutional right to confront witnesses and deprived him of due process of law. *Id.*

The Court of Appeals found that the trial court did err in admitting the deposition testimony and that the defendant's right to confrontation under the Sixth Amendment had been violated. The court reversed the conviction of the defendant. *Id.* at 347.

The United States District Court for the District of Nevada concluded that the detention of a material witness for two months was too long and ordered the taking of that witness's deposition and release thereon. In *United States v. Linton,* 502 F.Supp. 878 (D. Nev. 1980), the court held that "due to exceptional circumstances of the case, it is in the interest of justice that the testimony of Mr. Bratcher should be taken by deposition and preserved for use at the trial. . . . " *Id.* at 879. This order was made despite the fact that the government resisted on the basis that the material witness had failed, after subpoena, to appear at previous court proceedings. *Id.* at 878.

The United States District Court for the Southern District of New York, however, issued a contrary opinion and refused to release material witnesses after depositions were taken. In *United States v. Huang,* 827 F.Supp. 945 (S.D. N.Y. 1993), four material witnesses who were detained moved to have their depositions taken and to be

released from detention in order to return home to Taiwan. *Id.* at 946. The court permitted the videotaped depositions of the material witnesses and the criminal defendants moved for an order that conditioned the release of the material witnesses and prevented the government's deportation of the witnesses on the ground that the deportation of said witnesses would violate the petitioners' rights to confront the witnesses against them and to compulsory process. *Id.* The court discussed the above cases of *United States v. Eufracio-Torres, supra,* and *United States v. Guadian-Salazar, supra,* in deciding the confrontation issue. The court held that the use of the depositions would not violate the petitioners' right to confrontation. *Id.* at 950. However, the district court did hold that using the deposition testimony in lieu of live testimony would violate the petitioners' right to compulsory process under the Sixth Amendment and therefore did not allow the material witnesses to be released. *Id.* at 951.

Other state jurisdictions have also addressed the length of a material witness's detention. In *Ex Parte Grzyeskowiak,* 255 N.W. 359 (Mich. 1934), the Supreme Court of Michigan ordered the release of a material witness who had been held in custody for approximately four months. The court reasoned that "while we appreciate the difficulties encountered by the police in the detection of crime, the apprehension of criminals, and the securing of attendance of material witnesses, it is nevertheless the duty of all courts to prevent good or bad citizens from being unlawfully and unreasonably molested." *Id.* at 361.

The State of New York, however, has produced conflicting opinions regarding the length of detention for a material witness. In *People ex rel. Gross v. Sheriff of City of New York*, 277 A.D. 546, 101 N.Y.S.2d 271 (1950), the court concluded that a witness's detention for eleven weeks was not excessive or unreasonable. *Id.* at 277 A.D. 551. Conversely, the court in *People ex rel. Richards v. Warden of City Prison*, 277 A.D. 87, 98 N.Y.S.2d 173 (1950), declared that the material witness statute, although serving a very useful public purpose, may not be used simply to keep a witness confined. *Id.* at 277 A.D. 89. The court ordered that a witness's application for Writ of Habeas Corpus should be sustained and that the witness should be released upon furnishing a lower amount of bail when the witness had been confined for approximately six weeks. *Id.* at 277 A.D. 90.

The United States Congress and nine state legislatures have recognized the substantial hardship and deprivation of liberty that can take place if a witness is allowed to be detained indefinitely pending a trial. Those states include Kansas, Louisiana, Montana, New Mexico, Washington, Wisconsin, Wyoming, Hawaii, and South Dakota.[6] The states just mentioned and the federal government statutorily require that a deposition or examination of the witness take place if the witness is unable to comply with conditions of release. Iowa's statute has no provision for

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[6] Kan. Stat. Ann. 22-2805; La. Rev. Stat. 15:257-259; Mont. Code Ann. 46-11-60; NM Stat. Ann. 31-3-7; Wash. Rev. Code Ann. 10.16.145, 160; Wisc. Stat. Ann. 969.01(3); Wy. Rule of Cr. Proc. 46.3; Haw. Rev. St. Ann. 835.1-8; SD Cod. Laws 23A-43-18; 18 U.S.C. §3144.

deposition or other examination in the event a witness is indigent and does not have the means to post bail as was the case for the petitioners. App. 29.

The above cases show that the lower courts, when faced with these questions, have struggled to determine what is constitutionally permissible under due process when attempting to balance the liberty interests of the witness, the right to confrontation and compulsory process of the criminal defendant, and the right of the government to present live witnesses in support of the charge. This court should grant this Petition to consider this difficult issue. As the above cases demonstrate, there is wide disparity as to what the lower courts believe is too long to detain a person only suspected of witnessing a crime. Certainly, the length of the petitioners' incarceration, over five months, must give this Court cause to consider whether the actions of the State in this case "shock the court's conscience." See *Rochin v. California*, 342 U.S. 165 (1952).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Supreme Court of Iowa.

STATE of Iowa, Appellee,

v.

Antonio HERNANDEZ-LOPEZ, Joe Edward Ramirez, and Alberto Ruiz, Appellants.

No. 00-1855.

Jan. 24, 2002.

Michael J. Jacobsma of Klay, Veldhuizen, Bindner, De Jong & Pals, P.L.C., Orange City, for appellants.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Mark J. Schouten, County Attorney, for appellee.

CADY, Justice.

I. Background Facts and Proceedings.

This application for discretionary review provides us with our first opportunity to interpret Iowa's material witness statute. *See* Iowa Code § 804.11 (1999). Although the issues in this appeal are technically moot, we address a portion of the challenge to the constitutionality of the statute because it is likely to recur yet evade appellate review. On our review, we find the statute survives the substantive and procedural due process facial challenges. We therefore affirm the decision of the district court.

On August 5, 2000, Antonio Hernandez-Lopez, Joe Edward Ramirez, Alberto Ruiz,[1] and Angel Alvarado

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[1] For the remainder of this opinion, Antonio Hernandez Lopez, Joe Edward Ramirez, and Alberto Ruiz will be referred to collectively as "the defendants."

Esquivel were occupants in an automobile involved in a fatal accident with a motorcycle. Esquivel was driving the automobile, while the other three occupants were passengers. All four occupants fled the scene of the accident. They were apprehended by members of the Sioux County Sheriff's Office the following day.

The initial investigation of the accident revealed the automobile had caused the accident by crossing the highway centerline and striking the motorcycle head-on. However, the investigating officers were unable to discern who was driving the automobile at the time of the accident. None of the vehicle's occupants would acknowledge the identity of the driver. In fact, Esquivel and Ramirez provided false names and explanations of their whereabouts on August 5 upon questioning by the officers. Consequently, all four individuals were arrested as material witnesses pursuant to Iowa Code section 804.11.

On August 7, Esquivel and the defendants were brought before a magistrate for an initial appearance. *See* Iowa Code § 804.23 (individual arrested as material witness pursuant to section 804.11 must be brought before nearest magistrate without unnecessary delay). The magistrate found probable cause to believe they were material witnesses. An appearance bond of $32,500 was set for each defendant.

The deputy sheriff who was in charge of investigating the accident, and who arrested the defendants, filed a complaint and affidavit on August 8. The deputy claimed in the complaint that he had reason to believe the defendants were necessary and material witnesses to a felony

and that they might be unavailable for service of a subpoena. He further stated in the affidavit that the defendants were occupants of a motor vehicle involved in the fatal collision. Additionally, the affidavit indicated the defendants fled the accident scene and were later apprehended by law enforcement personnel.

The county attorney subsequently filed trial informations against the defendants claiming they were material witnesses under section 804.11. Each information contained the proposed witness testimony of the deputy who filed the complaint and affidavit. The minutes of testimony further explained the defendants were Mexican nationals believed to have entered this country illegally. The Immigration and Naturalization Service (INS) had placed detainers on the defendants.[2] The detainer required the State to immediately transfer the defendants to INS custody upon release from state custody.

A bond review hearing was held on September 5. The State resisted the defendants' request to reduce the $32,500 bond to an unsecured appearance bond. The State cited the defendants' critical role in the ongoing investigation of the accident and the likelihood they would be unavailable for trial if released. The district court denied the defendants' application.

Laboratory reports completed by the Department of Criminal Investigation on September 11 revealed

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[2] An INS detainer is an informal process in which the INS advises state prison officials that a state detainee is wanted on other charges and requests the state prison officials to notify the INS before releasing the detainee. *Orozco v. United States I.N.S.*, 911 F.2d 539, 541 n. 2 (11th Cir.1990).

Esquivel was the driver of the automobile on August 5. On October 17, Esquivel was formally charged by trial information with committing the crimes of vehicular homicide and leaving the scene of an accident.[3] The defendants gave depositions in the underlying matter on October 24. Esquivel and his counsel were permitted to conduct their own examination of the defendants during the depositions.

A second bond review hearing was held on October 30. The defendants advanced both facial and as-applied constitutional challenges to section 804.11. Specifically, the defendants contended section 804.11 violated their rights to due process under the state and federal constitutions. Additionally, the defendants alleged the statute violated the Eighth Amendment to the United States Constitution by infringing upon their right to be free from excessive bail. Both the State and Esquivel resisted the application. The district court denied the request.

The defendants then applied for discretionary review with this court. We granted the application on January 3, and reduced the appearance bond to $1,000 for each defendant. Esquivel subsequently pled guilty to vehicular homicide in violation of section 707.6A(2) and leaving the scene of an accident in violation of section 321.261(3).

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[3] The trial information charged Esquivel with two counts of vehicular homicide: (1) vehicular homicide in violation of section 707.6A(1) by operating a motor vehicle under the influence of alcohol; and (2) vehicular homicide in violation of section 707.6A(2) by operating a motor vehicle in a reckless manner with a willful or wanton disregard for the safety of others.

Following the rendering of the guilty plea, the material witness charges were dismissed. The district court released the defendants on January 8.

Because the defendants were no longer in state custody, the State filed a motion to dismiss this appeal as moot. Pursuant to the INS detainer, the defendants were transferred to INS custody upon their release from the county jail. The defendants have since been deported from this country.

On appeal, the defendants continue to claim the material witness statute violates due process and equal protection under our state and federal constitutions, and that bail was excessive under the Eighth Amendment to the federal constitution. Additionally, the defendants now claim the statute violates the Search and Seizure Clause to the state and federal constitutions, and also advance further equal protection arguments. Finally, they claim their rights under the statute were violated because they should have been released after their depositions were secured.

II. Standard and Scope of Review.

We review constitutional challenges to a statute de novo. *State v. Keene*, 629 N.W.2d 360, 363 (Iowa 2001); *State v. Cronkhite*, 613 N.W.2d 664, 666 (Iowa 2000). In doing so, we must remember that statutes are cloaked with a presumption of constitutionality. *Santi v. Santi*, 633 N.W.2d 312, 316 (Iowa 2001); *Keene*, 629 N.W.2d at 364. The challenger bears a heavy burden, because it must prove the unconstitutionality beyond a reasonable doubt. *Keene*, 629 N.W.2d at 364. Moreover, "the challenger must

refute every reasonable basis upon which the statute could be found to be constitutional." *Id.* Furthermore, if the statute is capable of being construed in more than one manner, one of which is constitutional, we must adopt that construction. *Santi,* 633 N.W.2d at 316.

III. Preservation of Error.

Generally, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court. *State v. McCright,* 569 N.W.2d 605, 607 (Iowa 1997). This general rule includes constitutional issues. *Id.* Thus, a party wishing to attack the constitutionality of a statute must do so at the first available time during the progression of the case. *Id.* If a party fails to timely apprise the district court of an issue, the matter is deemed unpreserved for our review. *Id.*

In their second application to review the release conditions, the defendants contended section 804.11 violated their rights to due process under the state and federal constitutions. The district court rejected this claim. Consequently, we conclude the defendants adequately preserved error on their substantive and procedural due process claims. The defendants also claimed bond was excessive and the imposition of bond violated the Equal Protection Clause by creating a class of indigent witnesses unable to satisfy bail requirements and a class of witnesses with the ability to post bail. The district court rejected the claims and the issues were preserved.

However, the defendants failed to preserve error on the remainder of the issues. Contrary to the defendants'

argument, a mere assertion that a statute is "unconstitutional" does not encompass every conceivable constitutional violation. If we adopted such a rule, we would be bombarded by constitutional challenges never addressed by a lower court in the case. Instead, a party challenging the constitutionality of a statute must alert the court to what specific constitutional provisions are allegedly compromised by the statute.

The defendants in this case did not properly raise their claims in district court that the statute constituted an unreasonable search and seizure and violated the Equal Protection Clause. They did not frame any challenge before the district court in the context of the Fourth Amendment. Similarly, the equal protection claim presented to the district court was based solely on the defendants' status as indigents. On appeal, a second equal protection claim is raised in the context of greater rights afforded to those arrested for crimes than those arrested as material witnesses. Accordingly, this issue was not preserved for review.

We reject the defendants' suggestion that the importance and gravity of an unpreserved constitutional issue creates an exception to our error preservation rules. "[W]e do not recognize a 'plain error' rule which allows appellate review of constitutional challenges not preserved at the district court level. . . . " *Id.*

Likewise, the defendants raised the issue of a violation of their statutory rights for the first time in this appeal. Accordingly, this issue was also not preserved. Any other issues raised by the defendants and not specifically addressed are also deemed unpreserved.

IV. Mootness.

Although the defendants adequately preserved their substantive and procedural due process challenges, the State seeks to dismiss these claims on mootness grounds. Ordinarily, an appeal is deemed moot if the issue becomes nonexistent or academic and, consequently, no longer involves a justiciable controversy. *In re M.T.*, 625 N.W.2d 702, 704 (Iowa 2001). We generally refrain from reviewing moot issues. *Polk County Sheriff v. Iowa Dist. Ct.*, 594 N.W.2d 421, 425 (Iowa 1999); *Shannon v. Hansen*, 469 N.W.2d 412, 414 (Iowa 1991). However, an exception exists for issues of broad public importance likely to recur. *M.T.*, 625 N.W.2d at 704; *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999); *Maguire v. Fulton*, 179 N.W.2d 508, 509-10 (Iowa 1970). We have previously noted that issues addressing the constitutional validity of statutes may fall within the exception to the mootness doctrine. *Maguire*, 179 N.W.2d at 510.

In determining whether we should review a moot action, we consider four factors. These factors include: (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review. *Polk County Sheriff*, 594 N.W.2d at 425; *see Shannon*, 469 N.W.2d at 414. The last factor is perhaps the most important factor. *See M.T.*, 625 N.W.2d at 704-05. If a matter will likely be moot before reaching an appellate court, the issue will never be addressed. Thus, the high likelihood of the issue recurring necessarily implies the desirability of an

authoritative adjudication on the subject. *State v. Hill*, 334 N.W.2d 746, 747 (Iowa 1983).

We agree with the State, in part, that this appeal should be dismissed on mootness grounds. The defendants have been released from custody and are no longer within the jurisdiction of this state. A decision on their as-applied constitutional challenges would have no practical legal effect in the underlying controversy. *See M.T.*, 625 N.W.2d at 704 (we dismiss appeals when judgment would have "no practical legal effect upon the existing controversy" (citations omitted)); *T & K Roofing Co.*, 593 N.W.2d at 162-63 (same). Consequently, we decline to address their claims that section 804.11, as applied to their specific factual situation, violated their rights to substantive and procedural due process. Similarly, we decline to address the equal protection challenges based on the indigency status of the defendants and the claim of excessive bail.

Nevertheless, the defendants' facial due process challenges are issues of public importance. Our appellate courts have not yet interpreted section 804.11, and a decision would provide guidance to law enforcement personnel and judicial officers faced with similar situations in the future. *See Polk County Sheriff*, 594 N.W.2d at 425; *Shannon*, 469 N.W.2d at 414. It is a virtual certainty that another individual will be arrested under this statute. Most importantly, we believe this is a case capable of repetition, yet evading appellate review. *See Polk County Sheriff*, 594 N.W.2d at 425-26. Considering the time for processing an appeal, in addition to the relatively short duration of detentions under section 804.11, a detainee will often be released from custody before an appellate

court can reach the issue. *See M.T.*, 625 N.W.2d at 705; *Polk County Sheriff*, 594 N.W.2d at 426; Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 Iowa L.Rev. 1, 3 (1969) [hereinafter Carlson]. We therefore conclude this appeal falls within the exception to the mootness doctrine.

V. Standing.

In addition to mootness, we must also consider whether the defendants have standing to claim that the statute is unconstitutional on its face. *See State v. Hunter*, 550 N.W.2d 460, 463 (Iowa 1996), *overruled on other grounds by State v. Robinson*, 618 N.W.2d 306 (Iowa 2000). This inquiry is based on the traditional rule of constitutional adjudication that a defendant lacks standing to make a facial challenge to a statute when the statute is not unconstitutional as applied to the defendant. *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2915, 37 L.Ed.2d 830, 839 (1973); *Hunter*, 550 N.W.2d at 463. It is also tied to the companion principle that constitutional rights are personal in nature and may not be asserted vicariously. *Broadrick*, 413 U.S. at 610, 93 S.Ct. at 2915, 37 L.Ed.2d at 839.

In this case, we have declined to consider the as-applied challenges to the statute. Thus, the material witness statute has not been found to be constitutional as applied to these defendants. Moreover, we recognize exceptions to the rule that a defendant lacks standing to make facial challenges to a statute. *Hunter*, 550 N.W.2d at 463; *State v. Price*, 237 N.W.2d 813, 816 (Iowa 1976). One exception is when nonparties to the litigation " 'stand to

lose by its outcome and yet have no effective avenue of preserving their rights themselves.' " *Price*, 237 N.W.2d at 816 (quoting *Broadrick*, 413 U.S. at 611, 93 S.Ct. at 2915, 37 L.Ed.2d at 839). We think this exception applies here. If we refuse to recognize standing in this case, we fear third parties arrested under the material witness statute, as with the defendants in this case, would be unable to assert any challenge to the statute because of the mootness doctrine.Therefore, we conclude these defendants have standing to assert facial challenges to the statute.

VI. Material Witness Statutes.

Material witness statutes are in widespread existence throughout this country. *In re Francisco M.*, 86 Cal.App.4th 1061, 103 Cal.Rptr.2d 794, 802 (2001); *State v. Lloyd*, 22 Or.App. 254, 538 P.2d 1278, 1288 (1975). The majority of states have enacted such statutes, as well as the federal government. *Francisco M.*, 103 Cal.Rptr.2d at 802; Carlson, 55 Iowa L.Rev. at 1 & n. 1; *see* 18 U.S.C. § 3144 (2000) (federal material witness statute). These statutes serve a vital and useful public purpose in the prosecution of felony offenses. *People ex rel. Van Der Beek v. McCloskey*, 18 A.D.2d 205, 238 N.Y.S.2d 676, 680 (N.Y.App.Div.1963). It is widely recognized that the giving of testimony to one's knowledge of a crime is a public duty imposed upon every individual properly summoned within the court's jurisdiction. *Francisco M.*, 103 Cal.Rptr.2d at 797; *Cochran v. Lincoln County*, 203 Neb. 818, 280 N.W.2d 897, 900 (1979); *State v. Hand*, 101 N.J.Super. 43, 242 A.2d 888, 892 (1968); *Van Der Beek*, 238 N.Y.S.2d at 680. Although the personal sacrifice involved with the performance of this duty can be great, it is

essential to the administration of justice and public welfare. *Cochran*, 280 N.W.2d at 900; *Hand*, 242 A.2d at 892; *see Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 617-18, 49 S.Ct. 452, 456, 73 L.Ed. 867, 873 (1929) (exigencies of particular situation require detention of material witness where subpoena would not adequately secure witness' presence at trial).

At common law, courts did not have the authority to confine an individual as a material witness. *Hand*, 242 A.2d at 892; Carlson, 55 Iowa L.Rev. at 6. The most restraint imposed by a court was to require a witness to come on his or her own recognizance, without providing surety. *Id.* Thus, the authority provided to courts today to confine material witnesses is largely statutory. *Id.*; *see* 97 C.J.S. *Witnesses* § 33, at 420 (1957). Today, the public duty to testify in felony cases is so vital to our system of justice that an innocent person may be detained as a material witness without bail. *Francisco M.*, 103 Cal.Rptr.2d at 797; *Van Der Beek*, 238 N.Y.S.2d at 680. Furthermore, statutes providing for confinement of material witnesses are generally considered to be valid under the federal constitution. *Barry*, 279 U.S. at 618, 49 S.Ct. at 457, 73 L.Ed. at 874; *Francisco M.*, 103 Cal.Rptr.2d at 802 (citing *Hurtado v. United States*, 410 U.S. 578, 588 & n. 9, 93 S.Ct. 1157, 1163-64 & n. 9, 35 L.Ed.2d 508, 518 & n. 9 (1973)).

Iowa has had a material witness statute since 1851. *See* Iowa Code §§ 2876-2878 (1851); Carlson, 55 Iowa L.Rev. at 17 & n. 61. The statute was significantly revised in 1976. *See* 1976 Iowa Acts ch. 1245 (ch. 2), § 408 (codified at Iowa Code § 804.11 (1978)). It is currently found in Iowa Code section 804.11. The statute provides that a law enforcement officer may arrest an individual as a

material witness, with or without an arrest warrant, if the officer has "probable cause to believe that a person is a necessary and material witness to a felony and that such person might be unavailable for service of a subpoena." Iowa Code § 804.11. In addition to these guidelines, the statute requires the officer to inform the individual at the time of the arrest of the officer's identity and of the reason for the arrest. *Id.* Specifically, the officer must inform the arrestee that he or she is "believed to be a material witness to an identified felony and that the person might be unavailable for service of the subpoena." *Id.*

Additional guidelines exist under the statute to protect the individual interest of the arrestee and to safeguard the arrest procedure. Following the arrest, the officer must take the arrestee to the nearest or most accessible magistrate *"without unnecessary delay"* for an initial appearance. *Id.* § 804.23 (emphasis added). At the initial appearance, the officer must introduce a sworn affidavit demonstrating probable cause to believe the arrested individual is a necessary and material witness to a felony offense and that the individual might be unavailable for service of a subpoena. *Id.* The magistrate may then exercise his or her discretion to release the individual pursuant to section 811.2, or further confine the individual in accordance with the terms of an appearance bond. *See id.*

VII. Due Process.

The defendants challenge the statute under the Due Process Clauses of the Fourteenth Amendment to the

United States Constitution and article I, section 9 of the Iowa Constitution.[4] The federal and state Due Process Clauses are nearly identical in scope, import and purpose, and our analysis in this case applies to both claims.[5] *Santi*, 633 N.W.2d at 317; *In re Detention of Garren*, 620 N.W.2d 275, 284 (Iowa 2000); *Cronkhite*, 613 N.W.2d at 666; *State v. Klawonn*, 609 N.W.2d 515, 519 (Iowa 2000).

In essence, two individual interests are protected by the due process clause. *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697, 708 (1987). The first, substantive due process, prevents the government from interfering with "rights 'implicit in the concept of ordered liberty.' " *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292

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[4] The Fourteenth Amendment to the United States Constitution prohibits the states from "depriv[ing] any person of life, liberty, or property without due process of law," while article I, section 9 of the Iowa Constitution similarly provides that "no person shall be deprived of life, liberty, or property, without due process of law." *See In re Detention of Garren*, 620 N.W.2d 275, 284 (Iowa 2000).

[5] In addition to the due process challenges, the defendants contended the appearance bond violated their right to be free from excessive bail in accordance with the Eighth Amendment to the United States Constitution. The Eighth Amendment prohibits the government from engaging in cruel and unusual punishment. *See Cronkhite*, 613 N.W.2d at 669. The detention of material witnesses is not a form of punishment, as will be further explained. Moreover, government cannot punish an individual until a formal adjudication of guilt has been entered. *Bell v. Wolfish*, 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 1872 n. 16, 60 L.Ed.2d 447, 466 n. 16 (1979). Thus, the Eighth Amendment is inapplicable to this case. Instead, the proper constitutional inquiry for this claim is the Due Process Clause. *See id.*

(1937)). The second, procedural due process, requires government action resulting in the deprivation of a liberty interest to be implemented in a fair manner. *Id.* Thus, if a statute survives our substantive due process inquiry, we then scrutinize the procedural due process afforded. *See id.*

Lastly, we must remember the challenge we are reviewing is a facial challenge. A party making a facial challenge bears a heavy burden, as it must demonstrate the statute is incapable of any valid application. *Id.* at 745, 107 S.Ct. at 2100, 95 L.Ed.2d at 707; *Santi*, 633 N.W.2d at 316. In short, the challenger must show no conceivable set of circumstances exist under which the statute would be valid. *Salerno*, 481 U.S. at 746, 107 S.Ct. at 2101, 95 L.Ed.2d at 708.

A. Substantive Due Process.

The first step in analyzing a substantive due process challenge is to identify the nature of the individual right involved. *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16 (1993); *Santi*, 633 N.W.2d at 317; *Cronkhite*, 613 N.W.2d at 667; *Klawonn*, 609 N.W.2d at 519. If the asserted right is fundamental, we apply strict scrutiny analysis. *Flores*, 507 U.S. at 305, 113 S.Ct. at 1448, 123 L.Ed.2d at 18; *Santi*, 633 N.W.2d at 317; *Klawonn*, 609 N.W.2d at 519. We must then determine whether the government action infringing the fundamental right is narrowly tailored to serve a compelling government interest. *Santi*, 633 N.W.2d at 318; *In re Garren*, 620 N.W.2d at 286; *Klawonn*, 609 N.W.2d at 519. Alternatively, if we find the asserted right is not fundamental, the statute

must merely survive the rational basis test. *Klawonn*, 609 N.W.2d at 519. To withstand rational basis review, there must be a reasonable fit between the government interest and the means utilized to advance that interest. *Flores*, 507 U.S. at 305, 113 S.Ct. at 1448-49, 123 L.Ed.2d at 18; *Santi*, 633 N.W.2d at 317. We conclude the interest in this case involves a fundamental right. We have previously found an individual's interest in freedom from bodily restraint to be at the core of the liberty interests protected by due process. *In re Garren*, 620 N.W.2d at 284; *accord Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992).

Because section 804.11 involves a fundamental right, we must determine whether the detention of material witnesses is narrowly tailored to serve a compelling government interest. We find the government interest in securing the testimony of material witnesses for the prosecution of felony offenses is indeed compelling. The defendants concede the government interest is compelling, but contend the statute is not narrowly tailored because it does not provide for less restrictive alternatives to secure the witness' appearance at trial. The defendants propose other pre-trial release alternatives, including house arrest, electronic tracking devices, or other less drastic means. However, we find the statute does in fact provide for less restrictive alternatives. Section 804.23 explicitly permits the magistrate to exercise his or her discretion and order the release of an arrested individual. We conclude this discretionary authority also includes the power to consider and impose other less restrictive alternatives, such as the pre-trial release methods proposed by the defendants. *See* Iowa Code

§ 811.2; Ronald L. Carlson & Mark S. Voelpel, *Material Witness and Material Injustice*, 58 Wash. U. L.Q. 1, 22-23 & n. 153 (1980) (referencing Iowa Code section 811.2(1)(e)); Note, *The Preliminary Hearing – An Interest Analysis*, 51 Iowa L.Rev. 164, 181 (1965). Moreover, a statute need not provide for the least restrictive available alternative in order to be deemed constitutional. The pre-trial detention of material witnesses is not rendered unconstitutional just because there may be a more desirable form of custody. *See In re Garren*, 620 N.W.2d at 285 (discussing institutional custody of sexually violent predators).

The defendants further contend section 804.11 violates substantive due process because it permits impermissible punishment without a trial. To determine whether an infringement on liberty constitutes impermissible punishment, we look to the legislature's intent in enacting the contested statute. *Salerno*, 481 U.S. at 747, 107 S.Ct. at 2101, 95 L.Ed.2d at 708. If the legislature expressly intended to create punitive restrictions, the statute is unconstitutional as impermissible punishment. *Id.* However, if no such punitive intent existed, we must then determine whether the statute constitutes impermissible regulation. *Id.* A statute constitutes impermissible regulation if the deprivation of liberty is excessive in relation to the regulatory goal advanced by the government. *Id.*

We conclude the pre-trial detention imposed by the material witness statute does not constitute impermissible punishment without a trial. Our material witness statute does not possess a punitive purpose. The mere fact that an individual is subject to detention does not

necessarily mean the government is imposing punishment. *Id.* at 746, 107 S.Ct. at 2101, 95 L.Ed.2d at 708. An individual deemed to be a material witness is subject to detention because the individual possesses critical knowledge of a felony and is unlikely to attend trial even if subpoenaed. *Francisco M.*, 103 Cal.Rptr.2d at 805. The power to detain is utilized to secure a witness' attendance at trial, not to punish the witness. *Application of Cochran*, 434 F.Supp. 1207, 1212 n. 11 (D.Neb.1977); *Francisco M.*, 103 Cal.Rptr.2d at 805; *Cooks v. Rapides Parish Indigent Defender Bd.*, 686 So.2d 63, 66 (La.Ct.App.1996).

Thus, because we find section 804.11 to be regulatory in nature, we must determine whether the infringement imposed by the statute is excessive in relation to the regulatory goal. The regulatory goal of this statute is the presentation of a material witness' essential testimony at trial. *Francisco M.*, 103 Cal.Rptr.2d at 805. We find this to be a legitimate goal. Additionally, we do not believe the incidents of the pre-trial detention of a material witness are excessive in relation to this regulatory goal. *See Salerno*, 481 U.S. at 747, 107 S.Ct. at 2101, 95 L.Ed.2d at 709. The material witness statute limits the circumstances under which an individual may be detained as a material witness. In order to arrest an individual as a material witness, the law enforcement officer must have probable cause to believe the individual is a necessary and material witness to a felony and might be unavailable for service of a subpoena. *See* Iowa Code § 804.11. The arrestee is then entitled to a prompt detention hearing. *See id.* § 804.23. At the hearing, the officer must demonstrate to the magistrate the reasons for believing probable

cause exists to charge the person as a material witness. *See id.*

The only problem we find with section 804.11 is the portion addressing the likelihood of the unavailability of the defendant for trial. Section 804.11 only requires the arresting officer to believe an individual "might" be unavailable. We believe a stronger showing of unavailability is required before an individual may be arrested as a material witness. Because we are entertaining a facial constitutional challenge to this statute, we will interpret the statute to comport with constitutional principles. *See State v. Misik*, 238 N.J.Super. 367, 569 A.2d 894, 903 (1989) (court may remedy material witness statute lacking sufficient procedural safeguards without declaring statute unconstitutional). To comply with substantive due process, we conclude section 804.11 mandates an officer have probable cause to believe the individual will be unavailable for trial.[6] *See Bacon v. United States*, 449 F.2d 933, 943 (9th Cir.1971) (probable cause to believe may be "impracticable" to secure witness' presence by subpoena); *United States v. Nai*, 949 F.Supp. 42, 44 (D.Mass.1996) ("material witness will, in all likelihood, be unavailable" (citation omitted)); *Stone v.*

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[6] We acknowledge the illegal status of an individual is a factor for the magistrate to consider in determining the likelihood the witness will be available for trial. *United States v. Nai*, 949 F.Supp. 42, 45 (D.Mass.1996) (court influenced by fact Chinese illegal immigrants would be subject to immediate expulsion proceedings upon release from federal government's custody). Additionally, the magistrate may consider the witness' ties, or lack thereof, to the community. *Id.*

Holzberger, 807 F.Supp. 1325, 1337 (S.D.Ohio 1992) (witness' statements or behavior lead to conclusion it is reasonably unlikely he will appear); *Cooks*, 686 So.2d at 65 (statute requires showing of "good grounds to fear" material witness will be taken or depart from jurisdiction); *State ex rel. Dorsey v. Haines*, 63 Ohio App.3d 580, 579 N.E.2d 541, 542 (1991) (detention "necessary" to secure witness for trial). Incorporating this interpretation into the statute, we conclude the pre-trial detention of a material witness is not excessive in relation to the regulatory goal.

In reaching our conclusion, we do not discount the individual's fundamental liberty interest in freedom from restraint. *Salerno*, 481 U.S. at 750, 107 S.Ct. at 2103, 95 L.Ed.2d at 711. Yet, in circumstances where the government interest is "sufficiently weighty," an individual's fundamental liberty interest may "be subordinated to the greater needs of society." *Id.* at 750-51, 107 S.Ct. at 2103, 95 L.Ed.2d at 711. We believe the circumstances delineated in sections 804.11 and 804.23 under which the pretrial detention of material witnesses is permitted satisfies the strict scrutiny standard. *See id.* at 751, 107 S.Ct. at 2103, 95 L.Ed.2d at 711. Iowa's material witness statute "narrowly focuses on a particularly acute problem in which the [g]overnment interests are overwhelming." *Id.* at 750, 107 S.Ct. at 2103, 95 L.Ed.2d at 710. It is narrowly drawn to encompass only those individuals who have material knowledge to the commission of a felony and will be unavailable for service of a subpoena. *See In re Garren*, 620 N.W.2d at 286.

B. Procedural Due Process.

Although the material witness statute survives the defendants' substantive due process challenge, we must also determine whether the statute violates an individual's right to procedural due process. Procedural due process protections act as a constraint on government action that infringes upon an individual's liberty interest, such as the freedom from physical restraint. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18, 31 (1976); *Application of Cochran*, 434 F.Supp. at 1212. We consider the type of process due and determine whether the procedures provided in the statute adequately comply with the process requirements. *See Application of Cochran*, 434 F.Supp. at 1212.

In determining what process is due under a statute, we apply the test pronounced by the United States Supreme Court in *Mathews v. Eldridge*. *See Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 691 (Iowa 2002). These three factors include: (1) the private interest that will be affected by the government action; (2) the risk of the erroneous deprivation of the interest, and the probable value of additional procedures; and (3) the government interest in the regulation, including the burdens imposed by additional procedures. *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903, 47 L.Ed.2d at 33; *Bowers*, 638 N.W.2d at 691. In considering these factors, we must remember the flexible nature of due process. *Mathews*, 424 U.S. at 334, 96 S.Ct. at 902, 47 L.Ed.2d at 33; *Application of Cochran*, 434 F.Supp. at 1213.

At the very least, due process requires the defendant to receive formal notice of the charges against him and an

opportunity to be heard at a meaningful time in a meaningful manner. *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902, 47 L.Ed.2d at 32; *Application of Cochran*, 434 F.Supp. at 1213. Additional procedural safeguards adopted by courts reviewing material witness statutes for procedural due process challenges include:

> 1. Written notice of the allegations upon which the state relied for its claim of a right to require a recognizance or detention and of the time and place of the hearing on those allegations;
>
> 2. Disclosure at a hearing of the evidence in support of the state's claim;
>
> 3. An opportunity to be heard in person and to present witnesses and documentary evidence;
>
> 4. To the effect that it is practicable, the right to confront and cross-examine witnesses;
>
> 5. A hearing before a magistrate or other judicial officer; and
>
> 6. A written statement by the decision-maker as to the evidence relied upon and the reasons for any adverse decision.

Application of Cochran, 434 F.Supp. at 1214 (deriving guidelines from *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499 (1972)); *accord Misik*, 569 A.2d at 904. Another common procedure implemented by courts is to provide the defendant with the right to counsel. *Id.* We believe these are important procedural protections that should be utilized by district courts when confronted with an individual arrested as a material witness pursuant to section 804.11.

Considering these additional safeguards, we conclude the material witness statute survives the facial due process challenge. In so concluding, we acknowledge the serious risk of the erroneous deprivation of an individual's right to be free from physical restraint created by the material witness statute. *Application of Cochran,* 434 F.Supp. at 1214. Notwithstanding, the risk of error is diminished by the implementation of appropriate procedural safeguards. *Id.* We believe sections 804.11 and 804.23 already provide for most of these safeguards. Upon the arrest of a material witness, the arresting officer must inform the defendant of the reasons underlying the arrest. Iowa Code § 804.11. At the initial appearance before the magistrate, the officer must disclose the evidence in support of the arrest. *Id.* § 804.23. Following the hearing, the magistrate must explain the reasons for further detaining the individual. *See id.*The magistrate is also authorized to release the person under section 811.2. Thus, the provisions of sections 804.11 and 804.23 provide procedures to guide law enforcement personnel and judicial officers in the arrest of a material witness. *See Salerno,* 481 U.S. at 752, 107 S.Ct. at 2104, 95 L.Ed.2d at 712. These procedures must be strictly followed to prevent an abuse of the powers provided by the material witness statute. *Van Der Beek,* 238 N.Y.S.2d at 680; *Lloyd,* 538 P.2d at 1288.

In addition, we think it is important to emphasize that the material witness should be provided an opportunity to be heard at a later time similar to a preliminary hearing under rule of criminal procedure 2(4). The defendant should be permitted to be heard on all of the relevant issues, including whether a less restrictive

alternative is a viable option, as well as to present evidence. *Francisco M.*, 103 Cal.Rptr.2d at 805-06. An opportunity for the defendant to be heard is an essential aspect of the procedure to be adhered to under the material witness statute. *Id.* at 804. Moreover, this additional procedural safeguard will not threaten the government's interest in securing the material and essential testimony for the prosecution of felony offenses. *Application of Cochran*, 434 F.Supp. at 1214.

Lastly, we must address the defendants' contention the material witness statute violates the Due Process Clause by permitting law enforcement personnel to detain an individual without first obtaining an arrest warrant. *See* Iowa Code § 804.11 (officer may arrest material witness "with or without an arrest warrant"). We prefer an officer to obtain an arrest warrant from a magistrate by demonstrating his reasons for believing an individual to be a material witness reasonably likely to be unavailable for trial before arresting an individual as a material witness. However, we recognize exigent circumstances may exist in certain cases, such as where an officer is in hot pursuit of a witness and the warrant requirement would unreasonably frustrate the officer's efforts to locate the witness. *Hand*, 242 A.2d at 895. If we required an arrest warrant in every case, some witnesses may never be located. *See id.* A good example is when an officer arrives at a crime scene and discovers an eyewitness has fled. *Id.* The officer may be compelled to immediately locate the witness without delay, especially if no suspect has yet been apprehended. *Id.* Because the officer is limited by the probable cause requirements specified in section 804.11, there is little room for abuse. Moreover,

the restraint on individual liberty is short, as section 804.23 requires the officer to bring the witness before a magistrate "without unnecessary delay."[7] As with other warrantless arrests based on exigent circumstances, a warrantless arrest under section 804.11 may be upheld because a magistrate subsequently reviews the arrest and determines if further detention is warranted.[8] *See Hand*, 242 A.2d at 894.

VIII. Conclusion.

Because the material witness statute may be applied fairly, with the procedural protections previously discussed, there is no reason to declare the statute unconstitutional on its face.[9] *See Francisco M.*, 103 Cal.Rptr.2d at

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[7] The definition of "unnecessary delay" under our rules of criminal procedure is instructive in determining the standard under the material witness statute. *See* Iowa R.Crim. P. 1(2)(c) (" 'Unnecessary delay' is any unexcused delay longer than twenty-four hours, and consists of a shorter period whenever a magistrate is accessible and available."); *see also Fryer v. State*, 325 N.W.2d 400, 409 (Iowa 1982) (nineteen hours not unreasonable delay between arrest and initial appearance).

[8] Although it may appear otherwise, we emphasize that we are not addressing the defendants' unpreserved argument that the material witness statute violates an individual's right to be free from unreasonable searches and seizures. Yet, we recognize that when analyzing material witness statutes, there is little difference between a claim the detention is unreasonable under the Fourth Amendment and a claim the statute fails to comply with the Due Process Clause. *Application of Cochran*, 434 F.Supp. at 1216 n. 12; *Misik*, 569 A.2d at 899.

[9] We do not imply that the procedures followed by the State in this case, as revealed by the background facts and proceedings, necessarily conformed to the statute or should be

803; Carlson & Voelpel, 58 Wash. U. L.Q. at 13. We conclude sections 804.11 and 804.23 do not violate the Due Process Clause of the federal and state constitutions. We affirm the decision of the district court.

AFFIRMED.

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followed in future cases. For example, the complaint and affidavit was not presented to the magistrate until the day following the initial appearance. Furthermore, we find no authority or justification for the filing of a county attorney trial information against material witnesses.

IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

THE STATE OF IOWA, Plaintiff, vs. ANTONIO HERNANDEZ-LOPEZ, JOE EDWARD RAMIREZ, ALBERTO RUIZ, Defendants.	CRIMINAL NOS. FECR008875, FECR008876 AND FECR008877 RULING ON APPLICATION FOR REVIEW OF CONDITIONS OF RELEASE (Filed Nov. 7, 2000)

On October 30, 2000, a hearing was held on Defendants' application for review of conditions of release. Defendants appeared in person and through their attorney, Michael Jacobsma, and the State appeared through Sioux County Attorney Mark Schouten. Angel Alvarado Esquivel, appeared through his attorney, Mayer Kanter. After considering the statements of counsel, the contents of the file and applicable law, the Court rules as follows:

The defendants were occupants of a vehicle involved in a fatal accident. Angel Alvarado Esquivel is accused of being the driver and has recently been charged with Vehicular Homicide. The defendant's have been held as material witnesses since the date of the accident, August 5, 2000. All Defendants are citizens of Mexico, are allegedly in the United States illegally, and will be subject to deportation by the Immigration and Naturalization Service if released from custody. All are being held in the

Sioux County Jail with their bond set at $32,500, cash or surety.

The three material witnesses recently gave depositions in which both the county attorney and the attorney for Angel Alvarado Esquivel were allowed to participate. Defendants' attorney contends the material witnesses should now be allowed to sign an unsecured bond, and if they become unavailable for trial due to their deportation, their depositions will be admissible at trial. Both the State and Angel Alvarado Esquivel resist.

Although the Court appreciates the hardship on these material witnesses, the Court is convinced the present bond is necessary to assure their presence at trial due to their lack of community ties and the likelihood they will be deported if released. While the depositions may be helpful, they are no substitute for live testimony, particularly if ongoing discovery results in additional questioning of the material witnesses. Angel Alvarado Esquivel faces serious charges and his right to confront the witnesses against him should not be compromised for the convenience of the witnesses.

It is ordered that the requested modification of the conditions of release is denied. Present bond shall continue.

So ordered this 7th day of November, 2000.

/s/ James D. Scott
JAMES D. SCOTT, Judge of the
Third Judicial District of Iowa

IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

THE STATE OF IOWA, Plaintiff, vs. ANTONIO HERNANDEZ-LOPEZ, JOE EDWARD RAMIREZ, ALBERTO RUIZ, Defendants.	NO. FECR008875, 8876 AND 8877 APPLICATION TO REVIEW CONDITIONS OF RELEASE (Filed Oct. 16, 2000)

COME NOW the above-named Defendants and in support of their Application state:

1. The Defendants were arrested and taken into custody on August 6, 2000.

2. The Defendants are alleged to be material witnesses pursuant to Iowa Code §804.11.

3. Bail in the amount of $32,500 was placed upon the Defendants.

4. The Defendants are indigent and are still incarcerated in the Sioux County Jail, some 71 days after their initial arrest.

5. No Trial Information has been filed accusing any person of a crime to which the Defendants are witnesses.

6. Iowa Code §804.11 is unconstitutional on its face and as applied to the Defendants in that it is punishing the Defendants without benefit of a trial and is therefore a violation of the Defendants' rights to due process under the U.S. and Iowa Constitutions and is further a violation of their right to be free from excessive bail under the 8th Amendment to the U.S. Constitution.

WHEREFORE, Defendants pray that this Court order that Iowa Code §804.11 be held unconstitutional and that the Defendants be released from custody or, in the alternative, that the Defendants' bail be reduced to an unsecured bond.

KLAY, VELDHUIZEN, BINDNER,
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In The
Supreme Court of the United States

ANTONIO HERNANDEZ-LOPEZ,
JOE EDWARD RAMIREZ, and ALBERTO RUIZ,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

On Petition For Writ Of Certiorari
To The Iowa Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. ARE THE PETITIONERS' CLAIMS MOOT BECAUSE THEY WERE RELEASED FROM THE SIOUX COUNTY JAIL ON JANUARY 8, 2001 AND DEPORTED TO MEXICO?

II. HAVE PETITIONERS FAILED TO PRESERVE ERROR REGARDING THE CONSTITUTIONALITY OF WARRANTLESS ARRESTS BECAUSE THIS ISSUE WAS NOT RAISED IN DISTRICT COURT OR THE IOWA SUPREME COURT?

III. DID THE IOWA SUPREME COURT DECISION TURN SOLELY UPON THE PARTICULAR FACTS OF THE CASE?

IV. DID THE IOWA SUPREME COURT PROPERLY FIND THAT, EXCEPT IN EXIGENT CIRCUMSTANCES, AN OFFICER SHOULD FIRST OBTAIN AN ARREST WARRANT FROM A MAGISTRATE BEFORE ARRESTING AN INDIVIDUAL AS A MATERIAL WITNESS?

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OPINIONS BELOW

The State accepts the Petitioners' statement regarding the opinions below.

JURISDICTION

The State accepts the Petitioners' statement regarding the Court's jurisdiction over this matter.

STATUTES INVOLVED

The State accepts the Petitioner's statement regarding the statute at issue in this case, with the addition that Respondent references

The Fourth Amendment of the United States Constitution, which provides, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Iowa Code § 804.23. Initial appearance of arrested material witness before magistrate.

The officer shall, without unnecessary delay, take the person arrested pursuant to section 804.11 before the nearest or most accessible magistrate to the place where the arrest occurred.

At the appearance before the magistrate, the law enforcement officer shall make a showing to the magistrate, by sworn affidavit, that probable cause exists to

believe that a person is a necessary and material witness to a felony and that such person might be unavailable for service of a subpoena. The magistrate may order the person released pursuant to section 811.2.

Iowa Code § 811.2(7)(b). Appeal from conditions of release.

In any case in which a court denied a motion under paragraph "a" of this subsection to amend an order imposing conditions of release, or a defendant is detained after conditions of release have been imposed or amended upon such a motion, an appeal may be taken from the district court. The appeal shall be determined summarily, without briefs, on the record made. . . .

STATEMENT OF THE CASE

Respondent accept the petitioners' Statement of the Case with the following corrections. Respondent disagrees with petitioners' claim that "[t]hough never charged with any crime, Petitioners were arrested without a warrant and incarcerated for five months in the Sioux County Jail as material witnesses." Pet. Brief at 2. Petitioners were arrested on August 5, 2000 because they were in a car that crossed the centerline, struck a motorcyclist head-on, and killed the driver of the motorcycle. Pet. App. at 2. They were arrested because they fled the scene after the crime and investigating officers were unable to discern who was driving the automobile at the time of the vehicular homicide. Pet. App. at 2. Petitioners' Statement of the Case is therefore incorrect to the extent it implies the petitioners were initially "arrested" as material witnesses. Officers were not able to determine who was the driver of the

automobile until laboratory tests were completed on September 11, 2000. Pet. App. at 3-4.

Respondents also supplement the Statement of the Case with the following facts from the Iowa Supreme Court decision: Because the defendants were no longer in state custody, the State filed a motion to dismiss this appeal as moot. Pursuant to the Immigration and Naturalization Service detainer, the defendants were transferred to INS custody upon their release from the county jail. The defendants have since been deported from this country. Pet. App. at 5.

SUMMARY OF THE ARGUMENT

Petitioners have not met their burden of showing that this Court has jurisdiction to review their claims because they do not have a personal stake in the outcome of this lawsuit. Petitioners were released from the Sioux County Jail on January 8, 2001 and immediately turned over to the custody of INS. Pet. App. at 5. They were deported after they were turned over to INS. Pet. App. at 5. They also have not shown that this is an "exceptional" case that is "capable of repetition, yet evading review" because they have not shown the challenged action is too short to be fully litigated prior to cessation and that there is a reasonable expectation that they will be subject to the same action again. Petitioners also failed to preserve error because their claim that they were arrested as material witnesses without prior judicial approval was not raised or presented to the district court or the Iowa Supreme Court. This claim is actually a Fourth Amendment claim that the Iowa Supreme Court declined to address due to the

petitioners' failure to preserve error in district court. The petitioners' claim that their continued incarceration after their depositions were taken violates due process was also not preserved because it was not raised in district court and the Iowa Supreme Court specifically declined to address this issue. Petitioners also have not presented an important federal question for this Court to review because each state has a distinct material witness statute and the due process claims in each of the cases cited by petitioners vary based on the wording of each statute, the standing of the parties, and the factual circumstance of each case. Finally, the Iowa Supreme Court decision is favorable to the position the petitioners assert in this appeal and need not be disturbed.

REASONS FOR DENYING THE WRIT

I. THE PETITIONERS' CLAIMS ARE MOOT BECAUSE THEY WERE RELEASED FROM THE SIOUX COUNTY JAIL ON JANUARY 8, 2001 AND DEPORTED TO MEXICO.

The petitioners' claims are moot because they fail to present this Court with a case or controversy under Article III, section 2, of the Constitution. *Spencer v. Kemna,* 523 U.S. 1, 7, 118 S.Ct. 978, 983, 140 L.Ed.2d 43, 49 (1998). Federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them. *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 404, 30 L.Ed.2d 413 (1971). Mootness is a jurisdictional question because the Court is not empowered to decide moot questions or abstract propositions. *Id.* at 246, 92 S.Ct. at 404, 30 L.Ed.2d at 416. "To be cognizable in a federal court, a suit must be definite and concrete,

touching the legal relations of parties having adverse legal interests." *Id.* "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Id.*

It is the burden of the party who seeks the exercise of jurisdiction in his favor to "clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603, 622 (1990). Petitioners fail to meet this burden. Throughout all stages of the judicial proceedings, the parties must continue to have a "personal stake in the outcome of the lawsuit." *Spencer v. Kemna,* 523 U.S. at 7, 118 S.Ct. at 983, 140 L.Ed.2d 43, 49 (1998), *quoting Lewis v. Continental Bank Corp.,* 494 U.S. 472, 477-478, 110 S.Ct. 1249, 1254, 108 L.Ed.2d 400 (1990). "This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Id.* Petitioners were released from the Sioux County Jail on January 8, 2001 after the Sioux County Attorney's Office dismissed charges against them. Pet. App. at 5. They were immediately turned over to INS for deportation proceedings. Pet. App. at 5. Petitioners have not shown that under either state or federal law further penalties or disabilities can be imposed on them as a result of the material witness statute. *St. Pierre v. United States,* 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943) (refusing to allow petitioner to challenge contempt citation after completing 5-month sentence). The petitioners' claims are moot and this Court is without power to act – there is nothing for it to remedy

even if it is disposed to do so. *Kemna,* 523 U.S. at 18, 118 S.Ct. at 988, 140 L.Ed.2d at 56.

Petitioners claim that this Court should review their claims despite the fact that their cases have been dismissed because "the Iowa Supreme Court chose to address the constitutional validity of Iowa's material witness statute despite its conclusion that the issues raised were technically moot." Pet Brief at 10. The Iowa Supreme Court, however, did not address the claims petitioners raise here. The Iowa Court specifically found that petitioners' "as applied" Due Process challenge to the statute was moot because petitioners had been released from custody and were no longer within the jurisdiction of the state. *State v. Hernandez-Lopez,* 639 N.W.2d 226 (Iowa 2001). The Iowa Court declined to address the petitioners' claims that "section 804.11, *as applied to their specific factual situation,* violated their rights to substantive and procedural due process." *Id.* (emphasis added). Therefore the claims the petitioners make in this petition for writ of certiorari were specifically dismissed as moot by the Iowa Supreme Court.

The Petitioners also claim that this Court should review the Iowa Court decision because "this Court has, on many occasions, accepted review of a case if it is capable of repetition, yet evading review." Pet. Brief at 12. The capable-of-repetition doctrine, however, applies only in "exceptional situations." *Los Angeles v. Lyons,* 461 U.S. 95, 109, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983). Two circumstances must be simultaneously present in order for the doctrine to apply: 1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and 2) there is a reasonable expectation that the same complaining party will be subject to the same

action again. *Kemna,* 523 U.S. at 18, 118 S.Ct. at 988, 140 L.Ed.2d at 56. Neither of these circumstances are present here.

Petitioners have not shown that the challenged action is too short in duration to be fully litigated. In fact, their application for discretionary review was granted by the Iowa Supreme Court prior to the expiration of the district court proceedings. The Iowa Supreme Court ordered that district court proceedings be stayed and that the bond of the petitioners be lowered. Resp. App. 1. Alternatively, petitioners could have used Iowa Code section 811.2(7)(b) to summarily appeal the district court order requiring the posting of a $32,500 bond to an appellate court. This section allows material witnesses to challenge the conditions of release prior to the expiration of the underlying criminal action. Iowa Code §§ 804.11; 804.23 (2001).

In addition, the petitioners are citizens of Mexico who, at the time of this action, were in the United States illegally. Pet. App. at 5. INS placed a detainer on them on August 8, 2000 and they were turned over to INS for deportation proceedings after their release from the Sioux County Jail on January 8, 2001. Pet. App. at 5. There is not a reasonable expectation that the petitioners will be subject to the same action again. Petitioners have not established that the "capable of repetition doctrine" applies to this case. *Kemna,* 523 U.S. at 17-18, 118 S.Ct. at 988, 140 L.Ed.2d at 56.

II. PETITIONERS FAILED TO PRESERVE ERROR REGARDING THE CONSTITUTIONALITY OF WARRANTLESS ARRESTS BECAUSE THIS ISSUE WAS NOT RAISED IN DISTRICT COURT OR THE IOWA SUPREME COURT.

A. The Iowa Supreme Court Did Not Address Petitioners' "As Applied" Due Process Challenge.

The Iowa Supreme Court declined to address the petitioners' claims that Iowa Code section 804.11, as applied to their specific factual situation, violated their rights to substantive and procedural due process. *Id.* The Iowa Supreme Court stated that this issue was moot because the petitioners had been released from custody and they were no longer within the jurisdiction of the state. *State v. Hernandez-Lopez,* 639 N.W.2d 226, 235 (Iowa 2001). Petitioners' claim that section 804.11 is unconstitutional as applied to them has therefore not been preserved. The United States Supreme Court adheres to the rule that it will not consider petitioners' claim unless it was either addressed by, or properly presented to, the state court that rendered the decision it has been asked to review. *Adams v. Robertson,* 520 U.S. 83, 86, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1998).

The petitioners note that the Iowa Supreme Court chose to address the facial challenge to the validity of Iowa's material witness statute "despite its conclusion that the issues raised were technically moot." Pet. Brief at 10. It is true that the Iowa Supreme Court found that petitioners' facial due process challenge to section 804.11 was not moot because it was an issue of public importance, because appellate courts had not yet interpreted the statute, and because "a decision would provide guidance to

law enforcement personnel and judicial officers faced with similar situations in the future." *Id.* The fact that the Iowa Court addressed petitioners' "facial" challenge to the statute, however, does not save their "as applied" challenge to the statute that they attempt to pursue in this petition.

B. Petitioners Have Impermissibly Amplified Their Due Process Challenge.

In the district court, the petitioners' "facial" challenge to the constitutionality of the statute centered on the argument that their continued detention in the Sioux County Jail was "punishment." Their motion in the district court stated that section 804.11 was "unconstitutional on its face and as applied to the Defendants in that it is punishing the Defendants without benefit of a trial and is therefore a violation of the Defendant's due process under the U.S. and Iowa Constitutions. . . . " Pet. App. at 30. On appeal, the Iowa Supreme Court addressed this claim and found that the statute was not unconstitutional because the power to detain a material witness was "utilized to secure a witness' attendance at trial, not to punish the witness." *Henandez-Lopez,* 639 N.W.2d at 239.

Petitioners have now re-drafted their argument in this petition for writ of certiorari. They no longer emphasize that their detention was a violation of due process because it was punishment without trial. They now allege that their initial arrest was a violation of due process because officers did not have prior judicial approval. Pet. Brief at 13, 16. "A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and await review in this Court to specify the constitutional

provision it is relying upon." *Banker's Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, 77, 108 S.Ct. 1645, 1650, 100 L.Ed.2d 62, 71 (1988). "At the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* The issue of whether these petitioners were "arrested" as "material witnesses" without prior judicial approval was not raised or presented to the district court or the Iowa Supreme Court and this Court should refuse to allow petitioners to raise it for the first time in a petition for writ of certiorari. *Monks v. New Jersey*, 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) (Court may not address Constitutional questions raised for the first time in writ when state courts have had no opportunity to pass on it).

C. Petitioners' Claim Is Actually An Unpreserved Fourth Amendment Challenge.

Petitioners' claim is also not preserved because it is not really a Due Process argument. The petitioners claim that the statute unconstitutionally "authorizes the arrest of a person by a law enforcement officer 'with or without an arrest warrant.'" Pet. Brief at 13. This is actually a claim under the Fourth Amendment rather than the Due Process Clause. The Fourth Amendment provides an "explicit textual source of constitutional protection" against physically intrusive governmental conduct and it is the Fourth Amendment, not the "more generalized notion of 'substantive due process'" that is the guide for analyzing these claims. *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443, 454 (1989).

The Iowa Supreme Court specifically declined to address the petitioners' Fourth Amendment claims because "[t]hey did not frame any challenge before the district court in the context of the Fourth Amendment." *Hernandez-Lopez,* 639 N.W.2d at 234.

Petitioners attempt to evade this failure to preserve error by noting that in *Application of Cochran* the Court stated that "there can be little difference between the question of whether the arrest and detention are reasonable under the Fourth Amendment and whether they comport with the due process clause of the Fourteenth Amendment." *Cochran,* 434 F. Supp. 1207, 1212, n. 12 (D. Nebraska 1977). *Cochran* is inapposite. It was decided in 1977 and since that time the United States Supreme Court has made clear that a claim arising in the context of an arrest or investigatory stop of a person is properly characterized as one invoking the protections of the Fourth Amendment "reasonableness" standard rather than the Due Process Clause. *Connor,* 490 U.S. at 395, 109 S.Ct. at 1871, 104 L.Ed.2d 454 (claims that officers used excessive force in the course of an arrest, investigatory stop, or other seizure of a citizen should be analyzed under the Fourth Amendment); *Tennessee v. Garner,* 471 U.S. 1, 5, 105 S.Ct. 1694, 1698, 85 L.Ed.2d 1, 6 (1985) (use of deadly force to apprehend fleeing suspect reviewed solely by reference to Fourth Amendment rather than Due Process Clause); *Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 810, 127 L.Ed.2d 114 (1994) (refusing to recognize a substantive right under the Due Process Clause to be free from criminal prosecution except upon probable cause).

D. The Iowa Supreme Court Declined to Address Petitioners' Claim That Their Continued Incarceration After Their Depositions Were Taken Violated Due Process Because They Failed to Preserve Error.

The petitioners' claim that their continued incarceration after their depositions were taken violates due process was not raised in the district court or the Iowa Supreme Court. During the bond review hearing petitioners' counsel made the following argument with regard to the use of depositions:

> I would just like to tell the court, as has already been stated, these gentlemen's depositions have been taken, their testimony has been given. If they are unavailable for trial, I believe their testimony can be used for either party, and I believe that to hold them further without a definite trial date is violating their constitutional and statutory rights. I have nothing further.

Resp. App. 4.

The Iowa Supreme Court found that petitioners' "mere assertion" that a statute is unconstitutional did not encompass every conceivable constitutional violation and found that this issue was not preserved. *Hernandez-Lopez,* 639 N.W.2d at 233-234. Petitioners admit that the Iowa Supreme Court "refused to address petitioners' claims that the continued incarceration after deposition violated their due process rights." Pet. Brief at 19. They nevertheless contend that this ruling lets "stand the lower court's ruling that a five month incarceration was not unconstitutional because release would have violated the criminal defendant's confrontation clause rights." Pet. Brief at 19. This is

not an accurate representation. The district court never ruled on the constitutionality of the petitioners' continued incarceration after their depositions were taken because the petitioners' never raised this issue before the district court. Their failure to raise this issue below is fatal to their attempt to raise it for the first time in this petition for writ of certiorari. *Monks*, 90 S.Ct. 1563, 26 L.Ed.2d 54 (1970) (Court may not address Constitutional questions raised for the first time in writ when state courts have had no opportunity to pass on it).

III. THE IOWA SUPREME COURT DECISION TURNS SOLELY UPON THE PARTICULAR FACTS OF THE CASE.

It is clear that each of the petitioners in this case fled from the scene of a vehicular homicide and were initially apprehended because officers were not certain who was driving the car. Pet. App. at 2. The existence of exigent circumstances distinguishes this case from those cited by the petitioners. *Misik, Cochran* and *Hernandez-Lopez* all state that prior judicial approval to arrest is not necessary when exigent circumstances exist. *State v. Misik,* 238 N.J. Super. 367, 388, 569 A.2d 894 (1989) (a fleeing material witness still may be apprehended if the circumstances justify an arrest for obstruction of justice); *Cochran,* 434 F. Supp. at 1214 ("emergency procedures can be devised to serve the legitimate state interest where flight of the witness is imminent."); *Hernandez-Lopez,* 639 N.W.2d at 242 (we recognize exigent circumstances may exist in certain cases, such as where an officer is in hot pursuit of a witness and the warrant requirement would unreasonably frustrate the officer's efforts to locate the witness). Further, this Court would have difficulty deciding the

issue because, as mentioned, petitioners framed their due process argument to the district court as a constitutional deprivation due to prolonged post-arrest detention rather than a constitutional deprivation due to a warrantless arrest as they argue here. Pet. App. at 30. The record with regard to this issue was therefore not developed in this case.

In addition, the petitioners were in this country illegally and would in any event have been "detained" by INS after their release. This additional fact distinguishes this case from those relied on in the certiorari petition. The Iowa Supreme Court stated that this factor could be considered by a magistrate in determining the likelihood a witness would be "available" for trial. *Hernandez-Lopez,* 639 N.W.2d at 240 n. 6. Cases cited by petitioners are distinguishable because they do not include this complicating factor with regard to the material witnesses' unavailability.

The petitioners attempt to create an important federal question by arguing that state and federal decisions regarding the constitutionality of material witness statutes are in "conflict." Pet. Brief at 13. They claim that the Court in *Cochran* found that material witnesses were being detained in violation of due process. Pet. Brief at 14 *citing Cochran,* 434 F. Supp. at 1212. The petitioners also claim that in *Misik,* the Court concluded that due process requires that a person must be served with an order directing a person to appear before that person is apprehended or detained as a material witness. Pet. Brief at 15 *citing Misik,* 569 A.2d at 903. Petitioners claim that these questions present a federal issue because these Courts "have addressed the same due process claims that the Iowa Supreme Court has decided. . . . " Pet. Brief at 16.

However, the fact that these Courts have generally addressed "due process" claims does indicate that they have each decided the *same* due process claim.

As petitioner mentions, every state has its own material witness statute. Pet. Brief at 9. The statutes are not uniform and the "due process" analysis by each Court necessarily hinges on the unique language used in the different statutes. The material witness statutes at issue in this case, *Cochran,* and *Misik,* vary considerably. *Hernandez-Lopez,* 639 N.W.2d at 236; *Cochran,* 434 F. Supp. at 1209; *Misik,* 569 A.2d at 898, n. 2. Further, as mentioned, the Iowa Supreme Court ruled that petitioners' applied due process challenge was moot in *Hernandez-Lopez* and did not address that issue. *Hernandez-Lopez,* 639 N.W.2d at 235. The witnesses in *Cochran* and *Misik* were still being detained when the Courts addressed their "as applied" due process challenges. *Cochran,* 434 F. Supp. at 1216-1217; *Misik,* 569 A.2d at 905.

Further there are several factual distinctions between the material witness cases cited by the petitioners that make a comparison between the cases difficult. In *Misik,* for example, the Court noted that the witness was arrested as a material witness even though there was no pending criminal action, that the witness was interrogated for several hours after his arrest rather than immediately being brought before a magistrate, and that the prosecutor made no showing that the witness was "unavailable" as required by the statute. *Misik,* 569 A.2d at 376-377. In *Cochran,* the Court's analysis focused on post-detention procedures required when a state seizes a person and "commits him to complete custodial detention for an extended period of time." *Cochran,* 434 F. Supp. at 1212. Although *Misik* and *Cochran* deal broadly with the concept

of "due process," their factual distinctions make the holdings by the Courts difficult to compare.

In sum, while the petitioners claim that this case presents a federal issue concerning "due process," the cases they cite to support a "conflict" are diverse in terms of the statutes applied, the standing of the parties, and the circumstances of each case. The Iowa Supreme Court decision rests on an analysis of the unique facts of the case and does not present an important federal question for this Court to review.

IV. THE IOWA SUPREME COURT PROPERLY FOUND THAT, EXCEPT IN EXIGENT CIRCUMSTANCES, AN OFFICER SHOULD FIRST OBTAIN AN ARREST WARRANT FROM A MAGISTRATE BEFORE ARRESTING AN INDIVIDUAL AS A MATERIAL WITNESS.

This Court should also deny petitioners' petition for writ of certiorari because the one constitutional issue that was even arguably preserved – the facial challenge to the statute – was decided in petitioners' favor. Petitioners contend that the Iowa Supreme Court "held in this case that the warrantless arrest of Petitioners satisfied due process." They then contend that this holding is "directly contrary to decisions from Nebraska, New Jersey, and Ohio." Pet. Brief at 13. Neither of these contentions is accurate. As mentioned, the Iowa Supreme Court did not decide whether the arrest of *these* petitioners satisfied due process because it concluded that this issue was moot in light of the fact that they had been released from custody and were no longer within the jurisdiction of the state. *Hernandez-Lopez,* 639 N.W.2d at 235. The Iowa Supreme Court stated: "we decline to address their claims that

section 804.11, as applied to their specific factual situation, violated their rights to substantive and procedural due process." *Id.* The issue of whether the warrantless arrest of *these* petitioners was constitutional is not properly before this Court. *Robertson,* 520 U.S. at 86, 117 S.Ct. at 1029, 137 L.Ed.2d at 208.

The Iowa Supreme Court, however, did issue a careful and well-reasoned decision on the petitioners' facial due process challenge to the statute. In doing so, the Court addressed the claims the petitioners make in this petition for writ of certiorari. Petitioners argue that the *Hernandez-Lopez* decision is flawed because it stands in "stark contrast" to cases like *Cochran* and *Misik* and allows an officer to arrest a person "not even suspected of committing a crime but is only suspected of being a mere witness." Pet. Brief at 16. This claim is incorrect. The Iowa Supreme Court specifically found that in order to arrest a person as a material witness, the officer must have "probable cause to believe the individual is a necessary and material witness to a felony." *Hernandez-Lopez,* 639 N.W.2d at 239. The Court added the requirement that in order to comply with due process an officer also must have "probable cause to believe the individual will be unavailable for trial." *Id.* at 239-240.

The petitioners' claim that the statute allows an arrest without "so much as an ex parte warrant" was also addressed by the Iowa Supreme Court. Pet. Brief at 16. The *Hernandez-Lopez* Court specifically addressed the petitioners' contention that "the material witness statute violates the Due Process Clause by permitting law enforcement personnel to detain an individual without first obtaining an arrest warrant." *Id.* at 242. The Court stated that prior to arresting an individual as a material witness,

it is preferable that an officer "obtain an arrest warrant from a magistrate by demonstrating his reasons for believing an individual to be a material witness reasonably likely to be unavailable for trial." *Id.* The only constitutional challenges the petitioners have even arguably preserved were decided in their favor by the Iowa Supreme Court.

CONCLUSION

For the above reasons, the State respectfully asks this Court to deny Petitioners' Antonio Hernandez-Lopez, Joe Edward Ramirez, and Alberto Ruiz' Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 00-1855

Sioux County No. FECR008875
Sioux County No. FECR008876
Sioux County No. FECR008877

ORDER

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTONIO HERNANDEZ-LOPEZ,
JOE EDWARD RAMIREZ and
ALBERTO RUIZ,
Material Witnesses-Appellants.

(Filed Jan. 03, 2001)

This matter comes before the court upon the material witnesses' application for discretionary review. The State filed a resistance to the application.

After an independent review of the record, we grant the application for discretionary review. The appeal is order to proceed pursuant to Iowa Rule of Appellate Procedure 203. The witnesses shall be released upon posting $1,000.00 bail, cash or surety. The district court proceedings shall be stayed until further order of this court.

Dated this 3rd day of January, 2001.

/s/ Mark S. Cady
Justice, Supreme Court of Iowa

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IN THE IOWA DISTRICT COURT FOR SIOUX COUNTY

STATE OF IOWA Plaintiff vs. ANTONIO HERNANDEZ-LOPEZ, JOE E. RAMIREZ and ALBERTO RUIZ Material Witnesses.	CRIMINAL NOS. FECR8875, FECR8876. FECR8877 TRANSCRIPT OF BOND REVIEW HEARING

* * *

BEFORE: JAMES D. SCOTT, District Judge
AT: Sioux County Courthouse
COMMENCING: October 30, 2000
ENDING: October 30, 2000

* * *

Reported by Stephanie J. Early, CSR, RPR

* * *

INTERPRETER: Karen Riano

* * *

[7] witnesses, once I get into all of the discovery file, there may be further questions that I may have of these witnesses. And for that reason, I would resist their release at this time, although certainly I can understand their position and sympathize with them. But at the same time, I feel I have a person to represent and at this time I cannot tell the court for sure when we will be ready for trial. Thank you.

THE COURT: Has your client been arraigned?

MR. KANTER: No, Your Honor.

THE COURT: When do you think that will happen, Mr. Schouten?

MR. SCHOUTEN: The arraignment is set for today, Your Honor.

THE COURT: Mr. Jacobsma, I'll give you the last word if you want. Is there anything further you'd like to say?

MR. JACOBSMA: I would just like to tell the court, as has already been stated, these gentlemen's depositions have been taken, their testimony has been given. If they are unavailable for trial, I believe their testimony can be used for either party, and I believe that

to hold them further without a definite trial date is violating their constitutional and statutory rights. I have nothing further.

* * *